VIRGINIA LAW REGISTER

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Salutatory.

The Editor in Chief returns to his work with mingled feelings of pleasure and regret—pleasure that he may be able once more to get in touch with the members of the profession who are kind enough to read his lines; regret that his associates decline with asseverations, if not with oaths, to do any more editorial work, and that therefore the readers of the REGISTER will suffer a distinct loss. The Editor in Chief likes his work, it is true—that is the only reason he continues it,—but he is painfully conscious that it is at best hurried and slight work. Such as it is he appreciates the kind words said to him and of him, and trusts that he may take it up again in better and more vigorous shape.

In his little holiday as a matter of course he visited some of the most famous "Court Houses" (called occasionally "Palais de Justice"). The most pleasant memories yet linger of the exquisite building at Rouen, with its lace-like front, broken up by crests above each window that rise into the air in a pinnacle tracery of fretwork, filled with carved arabesques and statues and its Grande Chambre of the High Court, with its magnificent carved oak ceiling, whose dark and polished beauty has looked down upon the trials of over four hundred years.

The most magnificent structure for the housing of courts in the world, and the most expensive, is that at Brussels, but the building has only been finished in the last few years and has no antiquity behind it.

In the old Binnenhof at the Hague the Editor saw the High Court of Justice open and was struck with the absolute lack of ceremony. The three judges filed in and bowed to the bar, who stood until the judges took their seats, and a barrister at once commenced with his case, without even the semblance of an "Oyez."

The Editor visited the Court House in Edinburgh with its

splendid hall decorated with paintings and statuary, and one of the most beautiful modern stained glass windows in the world Memories of the great Scotch advocates and of the great Sir Walter give of course an ineffable charm to this old building which opens upon the square where John Knox lies buried, shut in by the old St. Giles Cathedral, and at whose corner stood once the "Heart of Midlothian."

The magnificent new buildings in which the courts are housed in London are probably next to Brussels the handsomest law courts in the world; but none surpass in charm the old Guild Hall at Exeter, which boasts of being the oldest in continuous service in the world. Here the Editor was shown a large "upper chamber" where the High Sheriff entertains at dinner every day during the term at his own expense, the judges and barristers attending on the court. The High Sheriff receives neither salary nor fees, has no work to do, but holds his office, as he himself is held, in high honour and esteem.

All the courts except the High Court in Holland, and of course the magistrates' courts, hold no terms in July and August, and the Inns of Court in London look deserted during those months and are well-nigh noiseless save for the tinkle of falling water in that fountain court where Ruth Pinch met her lover and around whose corner in "Brick court" you can yet visit Blackstone's old chambers above which Goldsmith once lived and out of whose upper windows one can almost see his grave in the contracted yard of the Temple Church.

Virginia Reports, Volume 110.

This last volume of Virginia Reports contains one hundred and twenty-one cases, of which one hundred and fifteen are civil and six criminal. Of the civil cases sixty-three are affirmed, fifty-one reversed, and one case is remanded. Of the criminal cases, two are affirmed and four reversed.

All of these cases have been in course of time digested or reported in full in the REGISTER. We therefore will not comment further than to say that the volume contains some cases of unquestioned novelty and interest. The criminal cases upon which

appeals were taken contain only one case of murder—Hardy's case. Two of the cases are for violation of the liquor laws. If the amount of criminal appeals is any indication of the peace and good order of a State, the Commonwealth is to be congratulated.

Berg's Case.

The newspapers have been very much troubled—in a newspaper's way—as to whether or not Adolph Berg committed any crime when he snatched from the pavement in New York a little twelve year old child, using him as a shield to escape the murderous bullet which killed the child, though intended for Berg. That he is guilty of manslaughter there can scarcely be any doubt, but our own inclination is to believe that he is guilty of murder. For if an unlawful act, dangerous to, and indicating disregard of human life, causes the death of another, the perpetrator is guilty of murder although he did not intend to kill. Regina *v.* Searn, 16 Cocke C. C. 311; State *v.* Morrison, 49 W. Va. 210; People *v.* Doyle, 2 Edm. & Sel. Cas. 528; Austin *v.* The State, 110 Church 748.

It is true that in this case the weapon was used by another party who, had he killed Berg, would have been guilty of murder, but what distinction can there be between the party who deliberately fires a gun into a crowd and a man who snatches an innocent child from the pavement and places him where he is liable to be killed, knowing that the position in which he places him is one that will endanger his life. The very snatching up of the boy was an assault—certainly an unlawful act. It was intentionally done, the manner in which it was done and all the circumstances rendered it likely to cause death or serious bodily harm, although at the moment it was done there may have been no actual intent to cause death or bodily harm. Evans *v.* The State, 109 Ala. 11; Adams *v.* The People, 109 Ill. 444; Commonwealth *v.* Drew, 4 Mass. 391.

If Berg had reasonable cause to believe or know that his conduct was likely to result in death, it was murder; but if he had not such cause to believe or know, it was manslaughter. Commonwealth *v.* Fox, 7 Grey 585.

The case is analogous somewhat to the case of United States *v.* Woods, 28 Fed. Cases; 4 Cranch C. C. 484, where the master of a ship knowing that a seaman was weak from debility and exhaustion, compelled him to go aloft, and was held to be guilty of murder, the seaman falling from the mast and drowning. And in the case of Castell *v.* Bambridge, 2 Str. 854, the willful exposure of a prisoner to contagious disease was held to be murder.

Of course there can be no question as to the moral responsibility of the miserable wretch, but we are of the opinion that his legal responsibility is equally clear and we do not believe he can escape the punishment which his crime deserves.

The Supreme Court of the United States.

Never in its history has the Supreme Court met under circumstances like those under which it assembled on the tenth ultimo—the Chief Justice dead and one member permanently disabled from duty and his resignation in the hands of the President; and pending before it questions of magnitude involving not only the validity of important laws of the Federal Government, but monetary interests whose extent is almost beyond human calculation. The Court did only what was expected when it postponed the hearing of the cases against the Standard Oil Company, the American Tobacco Company, and the Corporation Tax cases, and cases of similar gravity and importance until the vacancies in its ranks could be filled.

It is well for the country that we have as President a man who, having been himself an upright and just judge, realizes his responsibility in making judicial appointments. The whole country, we believe, has confidence in this characteristic of Mr. Taft. No saner message has ever been uttered than that which he delivered when in his letter accepting the resignation of Mr. Justice Moody he said, anent the judicial office:

> "The approach of every question for decision with indifference to every consideration except to reach a right and just conclusion, and to preserve the fundamental structure of

> our government as our fathers gave it to us, makes the functions of the office most precious to one who feels in every fibre, as you do, their sacred importance."

That a judge carries upon the bench the political opinions he held as a layman no man doubts, and the history of courts has too well shown; but many of the judges have been, and we believe will continue to be, able to forget political bias and preconceived opinions and to approach our greatest questions "with indifference to every consideration except to reach a right and just conclusion."

As yet only vague rumors have reached the public as to proposed appointments and no one of these rumors has any well grounded foundation. We believe the President's appointees will be good men and true, and worthy of the high and sacred office to which they will be called.

Fees of Witnesses Held under Order of Court.

Judge Harrison of Winchester has been confronted with a question which it seems to us he has met in the right way, but which is certainly a question of novelty and interest. One Manifold was arrested for felony and two witnesses for the Commonwealth, Jasper and James Lavender, being unable to give security for the attendance at the trial, were committed to jail by the magistrate under § 4095 of the Code of 1904. They remained in custody from July to October and then claimed fees for their attendance as witnesses from the day of their detention until they had testified. Judge Harrison allowed the claim and certified it for payment, but according to the daily papers expressed some doubt as to its allowance. It seems to us that the claim is undoubtedly just and should be paid under a proper construction of the Statute. Section 3549 provides that "A person *attending* as a witness *under a summons,* shall have fifty cents for *each day's attendance* and four cents per mile for each mile beyond ten miles necessarily traveled *to the place of attendance.*"

Section 3535 allows a witness for the Commonwealth fifty cents *for each day's attendance.* Now the Lavenders in jail

were certainly *in attendance*. The words *"on the court"* are generally read into the Statute, but even admitting that they are properly read into it, these witnesses were in attendance on the court and awaiting its pleasure.

There is no decision in this State upon the question, but in Maryland it has been decided in Hall *v.* Somerset Co., 82 Maryland 771, that a witness who *can* but *will not* give security for his appearance and is committed will not be entitled to a per diem fee during any of the time he may be held in custody, but a witness who was unable through no fault of his own, to give security and was so committed *was* entitled to per diem fees for the whole term of his detention. The language of the Maryland Statute is a witness *"attending the court* is allowed one dollar for each day such witness shall attend for the discharge of his duty."

In Higginson's case, 1 Cranch C. C. 73, compensation was allowed in such a case. In Hutchins *v.* State, 8 Mo. 288, a witness was allowed his fees for each day held in custody.

The only case holding otherwise which we have been able to find is Markwell *v.* Warren Co., 53 Iowa 422, where the court held that a witness detained in jail to secure his attendance was not in attendance upon the court and could not be allowed fees for the time he was thus detained. Every consideration of right and justice, however, would seem to lead to a different conclusion and under the wording of our Statute we believe Judge Harrison's ruling the correct one.

Conviction on the Defendant's Evidence.

Our English brethern are arriving at some singular conclusions through their Court of Criminal Appeal, and the Bar at large are learning more of English criminal procedure through this court than they ever could have learned before. The case of Rex *v.* Jackson, 74 J. P. 352, exhibits a curious state of things and certainly does not reflect very much credit upon the defendant's counsel. Jackson was indicted for stealing electric lamps from a house. When the case for the Crown was closed there was nothing which amounted to

legal evidence against him, but witnesses were called for his defence and on cross-examination they made admissions which showed that the accused had been in possession of electric lamps for which he could not satisfactorily account. This fact made the chain, which was incomplete when the prosecution was closed, entirely linked and Jackson was convicted.

Now comes in a curious dictum of the Court of Criminal Appeal. They sustained the conviction but they said it was the duty of the Judge to have stopped the case on the conclusion of the evidence for the prosecution, but as he had not done so, and the evidence brought in by the defense had supplied the legal proof previously lacking, the conviction had to be sustained.

The English *Law Journal* lays down the rule that it is for the prosecution to prove its case without the assistance of the defense, which of course is true, but the way in which that paper states the rule would seem to indicate that a conviction could not be obtained before this decision, although there was sufficient evidence introduced by the defense to supply the Crown's lack of testimony. We are inclined to think, however, that a new trial ought to have been granted, for the reason which a distinguished Virginia Judge once gave when an outrageous verdict had been obtained and the counsel whose client had lost the case moved for a new trial. "Motion is granted," said the Judge, with a good deal of acerbity. Counsel for the plaintiff remonstrated and asked the court the reason why the new trial was granted. "On the ground of ignorance of counsel for the defendant," was the reply of the court.

Legal Advertising.

The old ideas of the dignity of the Bar yet prevail in England, and the Council of the Bar has lately passed resolutions which show it to be a strict guardian of legal etiquette. According to these resolutions:

> An English barrister ought not to allow his name and address to appear in a legal directory published abroad, the clients to whom a member of the Bar is entitled to send a notice of his change of address do not include "every solicitor from whom he may have at any time received a set of papers;" a barrister who gives any commissioner or present to anyone

introducing business to him is guilty of most unprofessional misconduct; members of the Bar ought not to furnish "signed photographs of themselves for publication in legal newspapers."

This latter resolution would be a terrible blow in this country, if it extended to the daily newspaper with its portraits of leading Counsel in any prominent case. By the way the English Courts are seriously thinking of prohibiting the camera in the court room and making it an offense to sketch any person during the conduct of a case.

Promotion of Mr. Justice Harlan.

We heartily concur with the suggestion made by our contemporary, the *National Corporation Reporter* that the merit system be adopted in the case of appointments to the supreme court of the United States, to the end that Mr. Justice Harlan be promoted to the vacant chief justiceship. His fitness cannot be questioned by any one, more especially as he is at present discharging the duties of presiding officer of that great tribunal with the dignity and learning that has always characterized the actions of Justice Harlan during his long term of service on the supreme bench. If length of service counts for anything he is not only richly deserving of this promotion, but he is eminently fitted because of his thorough knowledge of federal practice, more especially because of his participation in all the decisions construing the Circuit Court of Appeals Act. He had served on the court nearly fourteen years before the passage of that act, and so has participated in all the decisions in which that act has come before the court for construction. There seems to be no reason, even political, why President Taft should not, in this instance at least, adopt the promotion system in filling the vacant chief justiceship of the United States Supreme Court.